

GOVERNMENT AND LIBERTY.

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A PAPER BY

JAMES W. GARNER.

Assistant Professor of Political Science, University of Illinois.

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## GOVERNMENT AND LIBERTY.

THE late Professor J. R. Seeley once said that each man's life is divided into two provinces, one, of government, the other, of liberty. To the first, he said, belongs all that part which is given up to authority, which is guided by a foreign will; to the latter all that part which he has to himself<sup>1</sup> The delimitation of these spheres is one of the most fundamental problems of modern political philosophy,<sup>2</sup> if indeed, it is not more "vitally momentous" than any other political question.<sup>3</sup> The conceptions which have prevailed at different times in the world's history and among different peoples concerning the relative areas of the provinces of authority and freedom have varied widely. Among the states of antiquity there was hardly any realm over which the individual alone was acknowledged to have jurisdiction, hardly any part of his life which was sacred from the intrusion of the state. Almost all his relationships were defined and his acts regulated by the state. His religion, his education, his profession and even his social status were in a large measure determined for him not by himself but by his government.<sup>4</sup> It is one of the commonplaces of political science that in ancient times the individual existed rather for the state than the state for the individual.<sup>5</sup> During the middle ages his will was largely controlled by the restraints of feudalism and ecclesiasticism. The constitution of the state, whether embodied in a written instrument or not, made no provision for safeguarding individual liberty, that is, it was primarily if not exclusively a constitution of *government*. It was not until near the end of the

<sup>1</sup> *Introduction to Political Science*, p. 120.

<sup>2</sup> Huxley, *Essays*, vol. i, p. 384.

<sup>3</sup> Humboldt, *Ideen zu einem Versuch, die Gränzen der Wirksamkeit der Staats zu bestimmen*, S. 1 : cf. also Wordsworth Donisthorpe, *Individualism, a system of politics*, p. 303 ; also Laboulaye, *L'État et ses limites*, p. vi, who says : " Cette delimitation est aujourd'hui le grand problème de la science politique."

<sup>4</sup> Compare Bluntschli, *Theory of the State* (Oxford trans.), p. 59.

<sup>5</sup> Aristotle, *Politics*, bk. I, ch. 2. For comparisons of ancient and modern conceptions of liberty see Laboulaye, *L'État et ses limites*, pp. 103-137, and Benjamin Constant, *Cours de politique Constit.*, vol. ii, p. 547, et seq.

eighteenth century that liberty came to be regarded as a proper subject of constitutional law. Several of the American State constitutions, notably those of Virginia of 1776 and Massachusetts of 1780, the Constitution of the United States as amended in 1790, and the French Constitutions of 1791 and 1793, contained "bills of rights" the purpose of which was to mark out a sphere of liberty for the citizen and provide the necessary safeguards to insure this realm against possible encroachments upon the part of the government.<sup>1</sup> With comparatively few exceptions all the written constitutions adopted since the beginning of the nineteenth century have embodied a recognition of the fundamental principles of liberty and thus have tended to exalt it equally with government as a proper subject of constitutional regulation.<sup>2</sup> It may, therefore, be doubted whether a written constitution which is not an instrument of liberty as well as of government fulfills the requirements of modern political science.<sup>3</sup>

Francis Lieber, a Prussian by birth, for a time a refugee from his native land, subsequently an American citizen by naturalization and long residence, was the first modern publicist to exalt civil liberty to its true position as "one of the chief subjects of the science of politics" and to make it the basis of an elaborate treatise on political science.<sup>4</sup> Lieber's view that the problem of liberty was one of the principal subjects of modern political science and that the "safety of the individual" no less than the "safety of the state" should be secured by constitutional guarantees was for a long time almost entirely ignored by European writers on politics. Recently Professor John William Burgess,

<sup>1</sup> For a discussion of these bills of rights, see Sherger, *The Evolution of Modern Liberty*, chs. ix, x, and xi.

<sup>2</sup> The principal exception is the present constitution of the French Republic, which is distinctly an instrument of government, containing no provisions relative to the content of civil liberty. To a less extent the same is true of the German Imperial Constitution.

<sup>3</sup> Compare Burgess, *Political Science and Constitutional Law*, vol. i, p. 137.

<sup>4</sup> *Civil Liberty and Self Government*, first published at Philadelphia in 1853 while Lieber was Professor of Political Economy in South Carolina College. A second edition enlarged and corrected appeared in 1859 after he had become professor of Political Science in Columbia College, New York. A third edition, edited by T. D. Woolsey, was published in 1874 and a fourth edition, containing an introduction by D. C. Gillman, was brought out in 1901.



in a way Lieber's disciple and academic successor, has elaborated the latter's doctrine of liberty in a suggestive volume entitled "Sovereignty and Liberty," in which he maintains that liberty equally with government should receive adequate treatment in the Constitution of the state, and that the sovereign, through the Constitution, should mark out a sphere of freedom for the individual and protect it by proper restraints from all possible encroachments on the part of the government as well as all possible invasions from every other quarter.<sup>1</sup> Burgess maintains that the state and not the government is the true source of liberty, and that where the guarantees for its enjoyment are not provided in the constitution the individual is left to the mercy of the government. If the government itself be allowed to determine the limits of its own sphere, the amount of liberty allowed will vary directly according to the degree of benevolence and liberality which characterizes the governors and inversely in proportion to their whims, caprices and ambitions; and whether the amount be large or small, it may be withdrawn at their will.

*Government* is defined by Professor Seeley as "a power of constraint or compulsion."<sup>2</sup> In political science it is power exercised by the state through duly constituted organs over all persons subject to the jurisdiction of the state.<sup>3</sup> We think of power and force as its most distinctive elements. Whatever other attributes it may possess it cannot exist without these.<sup>4</sup> The prime test of its internal strength lies in its power to compel or restrain the action of all individuals or associations of individuals subject to its jurisdiction.

The word liberty is used in various senses. In earlier times it was associated with a particular form of government. Thus in Republican Rome it was synonymous with Republican gov-

<sup>1</sup> Op. cit. vol. i, p. 87.

<sup>2</sup> *Introduction to Political Science*, p. 109.

<sup>3</sup> Compare Lewis, *Use and Abuse of Political Terms*, pp. 18, 19. "Government is so complex a thing," says Edmond Kelly, "that it is as difficult to define as a religion. It is like a mountain which changes its shape according to the point from which it is observed. It is impossible to get a model government that would represent more than one of its numerous sides." *Government or Human Evolution*, vol. i, p. 235.

<sup>4</sup> Cf. Funk-Brentano, *La Politique*, p. 26.

ernment as opposed to royalty. It is sometimes used by Englishmen at the present day as the equivalent of parliamentary government and again as synonymous with constitutionalism or free government. The French political philosophy of the 18th century confused it with equality. It is also not infrequently used in the sense of freedom from foreign dominion, that is, synonymous with national independence.

To frame a definition of liberty which will give an adequate idea of its content and limits is a difficult task, partly because liberty is largely an abstraction and partly because there is no consensus of opinion either as to its content or limits. The word liberty, said the late Lord Acton, resembles a camel and enjoys the distinction of having more definitions (two hundred) than any object in nature—one "whose wealth of interpretation has caused more bloodshed than anything else except theology."<sup>1</sup> Many will concur in the estimate of Lord John Russell that the majority of these definitions are scarcely deserving of consideration.<sup>2</sup> On the other hand, it is doubtless true, as Professor Seeley has observed, that if we knew what we meant by liberty, if we were always prepared with a clear and satisfactory definition of it, we should have no difficulty in discerning its proper place in political science, but we have so long accustomed ourselves to use the term without any such definiteness of idea that the concept which it presents pursues us like a will o' the wisp.<sup>3</sup>

Cicero conceived the essence of liberty to be "the right to live as you choose" (*potestas vivendi ut velis*).<sup>4</sup> This has always been the popular conception, but both experience and reason teach that no such freedom can be permitted to the individual and Cicero in fact contradicted himself elsewhere when he declared that liberty could have no place in any state where the laws were unequal and the power of public opinion not

<sup>1</sup> Inaugural address as Regius Professor of Mod. Hist. at Cambridge.

<sup>2</sup> *History of the English Government and Constitution*, p. 15.

<sup>3</sup> *Op. cit.* p. 104.

<sup>4</sup> *De Officiis*, bk. I, ch. 20; *Parad* 5, 1, 34. Cf. also Funk-Brentano: "La liberté est au point de vue de la politique, le pouvoir de faire ce qui nous plait." *La Politique*, p. 28.

supreme.<sup>1</sup> Montesquieu defined liberty as "the freedom to do what the law permits."<sup>2</sup> Bentham understood it to mean freedom to follow fourteen specific forms of pleasure so long as it worked no injury to the community.<sup>3</sup> A fallacious but widely prevalent eighteenth century conception is found in the French Constitutions of 1791 and 1793, both of which in substance define individual liberty to be "the right to do anything that does not injure others."<sup>4</sup> Another eighteenth century French view was the confusion of liberty with equality and sometimes with justice.<sup>5</sup>

Both the positive and negative aspects of liberty have been strongly emphasized by Sir George Cornwall Lewis, who says: "Liberty in the positive sense, consists of rights the enjoyment of which is beneficial to the possessor of them; in a negative sense, of exemptions from a painful duty or the absence of unnecessary or hurtful restraint."<sup>6</sup> Thus, while liberty is a

<sup>1</sup> *Republic*, C. 31. Compare Lacy, *Liberty and Law*, p. 53.

<sup>2</sup> *Esprit des Lois*, bk. II, ch. 3. Cf. Laveleye: "La liberté est le pouvoir de faire tout ce qui n'est pas contraire au droit, en pratique, tant ce qui n'est pas contraire aux lois. *Le Gouvernement dans la Démocratie*, p. 131.

Most of the earlier writers distinguished between natural liberty and civil or political liberty. Natural liberty, said Locke, is freedom from any power on earth except the law of nature (*Civil Government*, p. 202). Political or civil liberty, said Blackstone, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. The law which restrains may diminish one's natural liberty but it increases his civil liberty. Upon entering society, Blackstone continued, a man gives up a part of his natural liberty to act as he thinks fit, subject only to the law of nature, and receives in return other advantages. *Commentaries* (ed. by Chase) p. 64. This was Rousseau's idea that what a man loses by the social contract is a part of his natural liberty, and what he gains is civil liberty. *Social Contract*, bk. I, ch. 8. The theory of natural liberty is no longer accepted. It assumes that man in society possesses some of the freedom from legal restraint which exists in a state of nature and at the same time is entitled to the protection of the state. It is, in short, an attempt to reconcile the advantages of a social with the immunities of a savage state and therefore involves a self-contradiction. Compare Lewis, *Use and Abuse of Political Terms*, p. 157.

<sup>3</sup> *Principles of Morals and Legislation* (Oxford edition), bk. I, ch. 5; bk. II, ch. 7.

<sup>4</sup> *Declaration of the Rights of Man*, Secs. 4 and 6 respectively.

<sup>5</sup> Compare Lieber, *op. cit.* p. 30.

<sup>6</sup> *Use and Abuse of Political Terms*, pp. 151, 154. To the same effect is the view of Sheldon Amos that "Liberty in its positive side denotes the fullness of individual existence; on its negative side it denotes the necessary restraint on



negative term denoting absence of restraint, it also denotes a positive condition; it implies rights as well as immunities. John Stuart Mill in his celebrated Essay on Liberty enunciated the theory that liberty consists in doing what one desires subject to the right of mankind, individually or collectively, to interfere for self protection and for that alone.<sup>1</sup> Herbert Spencer's doctrine of liberty is summed up in the assertions that "the freedom of each individual is bound by the similar freedom of all," that "every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty by every other man," and that "every man is free to do what he wills provided he infringes not the equal freedom of any other man."<sup>2</sup> Two other English scholars whose opinions on the meaning of liberty are entitled to respect are Wordsworth Donisthorpe and Sir J. R. Seeley. Donisthorpe says "Civil liberty may be accurately defined as the greatest possible freedom of the individual from state interference compatible with the well being of the social organism."<sup>3</sup> As a statement of the negative side of liberty his definition is objectionable, because it takes no account of the immunity of the individual against any other forms of interference than that which arises from the action of the State itself, and because it ignores entirely the positive side of liberty—that is, liberty viewed as consisting of rights. Seeley conceives liberty in its "primary sense" to be the condition of a person who is not under governmental restraint or coercion. It is that province in his life over which government assumes no control but which is left to the

all which is needed to promote the greatest possible amount of liberty for each." *Science of Law*, p. 90. See also Burgess, *Political Science and Constitutional Law*, vol. i, p. 174. For other definitions see Locke, *Civil Government*, p. 202; Bodin, *De Republica*, bk. XII, c 6; Roscher, *Prins. of Pol. Econ.* I, 236; Leiber, *op. cit.* p. 40; Bosanquet, *Philosophic Theory of the State*, p. 146; Stephen, *Liberty, Fraternity and Equality*, p. 13; Argyle, *Reign of Law*, p. 329; Lacy, *Liberty and Law*, p. 58; McIntosh, *Law of Nature and of Nations*, p. 59; McKinnon, *History of Modern Liberty*, vol. i, p. vii. A recent treatise of particular merit is Desjardin's *De La Liberté Politique dans L'État Moderne*, (Paris 1894). Older philosophical discussions may be found in the various works of Jules Simon entitled *Liberté Politique*, *Liberté Civile*, *Liberté Religieuse*, etc.

<sup>1</sup> *Liberty*, p. 6 (People's Edition).

<sup>2</sup> *Social Statics*, pp. 45, 55 (Revised and abridged edition of 1903).

<sup>3</sup> *Individualism a System of Politics*, p. 295.

voluntary principle; that is, it is the absence of restraint or the opposite of government.<sup>1</sup> But liberty in the first sense hardly exists, for there are few if any fields of individual activity over which government does not exercise control. Liberty as we know it in modern states consists not in freedom from all governmental restraint but from the restraint of all government in excess of that required by the social well being.<sup>2</sup> Thus we understand by liberty of speech, of press, and of religious worship not immunity from all governmental restraints, but immunity from all unreasonable arbitrary and unnecessary restraints — unreasonable and unnecessary because not required by the demands of social expediency. This was what Paley had in mind when he defined liberty as consisting in freedom from the restraints of all law beyond that which conduces to the public welfare.<sup>3</sup>

It is evident from an examination of the definitions given above that no adequate concept of liberty can be compressed within the limits of a single sentence. It must have as many definitions as there are points of view from which the field of liberty may be surveyed. To say that liberty is the power to do what the law permits, that it is freedom from governmental restraints, that it is the right to live as you choose, that it is security of property, that it is the right to do whatever does not injure others, or that it is freedom from excessive government, is to define only particular aspects of liberty. For the purposes of this discussion we may consider liberty, first, as freedom from external restraint whether imposed by government or by private individuals or associations of individuals, and second, as the unobstructed enjoyment of positive rights created by the state. Liberty in the first sense is the antithesis of authority, the opposite of government. It consists of exemptions or immunities from governmental authority and therefore represents the negative status of the individual in his relation to government.

<sup>1</sup> *Introduction to Political Science*, pp. 120, 125.

<sup>2</sup> Cf. Funk-Brentano: "La liberté consiste, non pas dans le de'chainement des passions et des ambitions d'un chacun, ce serait l'anarchie, mais dans le respect des lois. Le droit absolu de la liberté disparaît; il n'existe plus que des libertés relatives dont les lois permettent et fixent l'usage." *La Politique*, p. 29.

<sup>3</sup> *Political and Moral Philosophy*, ch. v.

Liberty in the latter sense consists of positive rights, that is, it represents a condition in which the individual is not only free from the operations of governmental authority, but one in which he is empowered to positively invoke the aid and protection of government to enable him to realize fully and completely the ends of his existence.<sup>1</sup>

From the definitions quoted above several clearly differentiated theories of liberty may be deduced. First, there is the theory of absolute or unlimited liberty—advocated by the more extreme anarchists—a theory according to which the individual is free from all restraints imposed by the authority of organized government. It represents a state of society, says Huxley, in which the rule of each individual by himself is the only government the legitimacy of which is recognized—one in which he is not coerced into coöperation for the defense of his neighbor,<sup>2</sup> the unconditional realization of freedom, both objectively and subjectively.<sup>3</sup> The theory entirely ignores the common interests of the group and condemns all combined or organized action to restrain the separate interests of the individuals composing the group.<sup>4</sup> Those who advocate this view reject the organic theory of society with “undisguised contempt” and maintain that the individual has the same moral right to coerce society that society has to coerce the individual.<sup>5</sup>

Of the merits of this theory there should be no difference of opinion. If human experience teaches anything it teaches that were each individual allowed to determine for himself the limits of his own freedom, conflicting determinations would inevitably

<sup>1</sup> “Individual liberty has a front and reverse, a positive and a negative side. Regarded upon the negative side, it contains immunities; upon the positive, rights, i. e. viewed from the side of public law, it contains immunities, from the side of private law, rights. The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter.” Burgess, *Political Science and Constitutional Law*, vol. i, p. 174.

<sup>2</sup> Victor Yarros in Bliss, *Encyclop. of Soc. Reform*, p. 55.

<sup>3</sup> Zenker, *Anarchism*, p. 3.

<sup>4</sup> Compare Donisthorpe, *Individualism*, p. 303.

<sup>5</sup> Tucker, *Instead of a Book*, p. 132. By the abolition of government the anarchist means “the removal of all restrictions upon conduct intrinsically ethical and legitimate but which ignorant legislation has interdicted as criminal.” Art. “Anarchism” in Bliss, *op. cit.* p. 55.

follow and the result would be the subjection of the weaker to the stronger.<sup>1</sup> Unlimited liberty, as Professor Ritchie well observes, was never claimed by any sane or reasonable person.<sup>2</sup> It is even doubtful if there is anything among the most isolated groups of savage life which approaches it, if the term be used in the sense of doing what seems good in one's own eyes regardless of all that is done by others.<sup>3</sup> The law of human life from the cradle to the grave is the law of limitation.<sup>4</sup> There is no such thing in nature as action undetermined by surrounding conditions. Aristotle long ago pointed out that the state was before and higher than the individual and that the fullness of a complete life could not be realized by leaving each individual to seek his own happiness in his own way regardless of the happiness of others. Such freedom would lead to extremes of happiness and misery, for as there are extremes of strength, mental and physical, an unequal struggle would ensue which would result in the oppression of the weak by the strong.<sup>5</sup> The abolition of all restrictions imposed by government upon human conduct would be followed by the imposition of more arbitrary and tyrannical restrictions by powerful individuals and each man would be made the instrument of some other man's will through physical violence. A more execrable tyranny could not be imagined than that which would result. It would indeed establish the *bellum omnium contra omnes*, not merely *in potentia* but in actuality. Anarchy misreads the facts of individual life. It assumes, what is not true, that states are founded on and begotten of aggression. Whatever in human history is great or admirable has been found in governed communities; in other words, as Professor Seeley observes, has been the result of a certain restriction of liberty.<sup>6</sup> We must conclude therefore that if the state were abolished we should have not individualism but after a period of anarchy, the patriarchal stage or some other "natural" grouping of a more rudimentary form—that is,

<sup>1</sup> Compare Burgess, *op. cit.* vol. i, p. 88.

<sup>2</sup> *Studies in Political and Social Ethics*, p. 136.

<sup>3</sup> Compare Patterson, *Commentaries on the Liberty of the Subject*, vol. i, p. 74.

<sup>4</sup> Cf. McKinnon, *History of Modern Liberty* vol. i, p. vii.

<sup>5</sup> Compare Lacy, *Liberty and Law*, p. 100.

<sup>6</sup> *Introduction to Political Science*, p. 127.



society would begin over again from its lowest elements and only with the rise of the state could it escape from savagery and barbarism.<sup>1</sup>

Less radical than the theory of absolute and unlimited liberty is the "Equal freedom" doctrine of the French revolutionists, the moderate anarchists like Benjamin Tucker and Victor Yarros, and the extreme individualists like Herbert Spencer—the doctrine that the individual should be free to do what he wills provided he does not infringe upon the equal freedom of others.<sup>2</sup> As a fundamental principle of society such a theory is self destructive and contradictory. In the last analysis it would mean the equal right of every man to do everything, in short, it would mean in practice a war of all against all. If my right to do what I wish is limited by no other considerations than the equal right of others to do the same thing, I am practically unlimited as regards a large class of actions, and society has no protection against me. Upon this principle I would have a right to spread contagious diseases, sell adulterated food, maintain my premises in an unsanitary condition and so on, provided my action did not interfere with the equal right of others to do the same thing. Furthermore, if no one can do anything which interferes with the equal liberty of some other person the logical consequence might be that no one could do anything and incessant conflicts of rights and a social deadlock if not an ultimate dissolution of society would ensue.<sup>3</sup>

<sup>1</sup> Ritchie, *Studies in Political and Social Ethics*, p. 57. Cf. also Amos, *Science of Law*, p. 78, and Jevons, *The State in Its Relation to Labor*, p. 13.

<sup>2</sup> Tucker, *Instead of a Book*, p. 132; Yarros, "Anarchism," in Bliss, *op. cit.* p. 56; Spencer, *Social Statics* (Ed. of 1866), pp. 130, 229, 306. French Constitutions of 1791 and 1793. "Anarchy," says Tucker, "does not contend for the sovereignty of the individual but for the greatest amount of liberty compatible with equality of liberty." To the same effect is the view of Yarros that "the freedom of each individual is bounded only by the equal freedom of all."

<sup>3</sup> Auberon Herbert, one of the most extreme individualists, maintains that "each man and woman are to be free to direct their faculties and their energies according to their own sense of what is right and wise in every direction except one: they are not to use their faculties for the purpose of forcibly restraining their neighbor from the same free use of his faculties." "*Right and Wrong of State Compulsion*," p. 35. This is but another way of stating the "Equal freedom" doctrine and it is no less fallacious. It would condemn state compulsion in the interest of society and sanction the grossest immorality. It is somewhat similar



As a corollary to the proposition that everyone is free to do what he wills subject to the equal freedom of others, is the right of the individual, as Herbert Spencer maintains, to ignore the state, "drop connection" with it, relinquish its protection, abandon its benefits, throw off its burdens, refuse to contribute towards its support and "adopt a condition of voluntary out-lawry."<sup>1</sup> The right to ignore the state, he contends, is but the right to exercise all of one's faculties,<sup>2</sup> and unless such a right is recognized the acts of the state must be essentially criminal.<sup>3</sup> Government, he affirms, is inherently immoral, it exists only because crime exists and will disappear with the ultimate moral perfection of mankind.<sup>4</sup> Coercion, he declares, is immoral and can by no process be made equitable. They who maintain that the people are the only legitimate source of power, he continues, cannot deny the right to ignore the state without entangling themselves in an absurdity.<sup>5</sup> As a government can rightly act for the people only when empowered by them, he continues, so also can it rightfully act for the individual only when empowered by him.<sup>6</sup> Following the idea of the social contract, he argues that if A, B, and C debate whether they shall employ an agent, and if whilst A and B agree and C dissents, C cannot equitably be made a party to the agreement against his will, so no one can be forced into membership of the state contrary to his desires.

Such a view of liberty is little short of being anarchical although Spencer probably never regarded himself as an anarchist. Clearly no state founded on the right of the individual to ignore its authority while remaining within its territorial limits could endure for more than a very brief period. As for the right of the individual to relinquish the protection of the state and abandon its benefits while yet remaining within its jurisdiction, the idea is preposterous. Spencer's doctrine that coercion can never be to although less indefensible than the view embodied in the French Declaration of Rights, namely that "the exercise of the equal rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights and these limits are determined by law." *Constitutions of 1791 and 1793*, secs. 4 and 6.

<sup>1</sup> *Social Statics*, ed. 1866, ch. xix.

<sup>2</sup> *Ibid.* p. 237. <sup>3</sup> *Ibid.* p. 234. <sup>4</sup> *Ibid.* p. 230. <sup>5</sup> *Ibid.* p. 231. <sup>6</sup> *Ibid.* p. 232.

made equitable and that government is essentially immoral is condemned by the testimony of enlightened mankind and the experience of the civilized past. Finally, Spencer's doctrine of contract as applied to the organization of the state and the right of the government to act for the individual only when empowered by him is in its last analysis anarchy pure and simple and must be condemned *in toto*.

Probably no theory of liberty has been so generally discussed and criticised as that propounded by John Stuart Mill in his famous essay on Liberty,<sup>1</sup> the object of which we are told is to assert the very simple principle that the sole end for which society is warranted in interfering with the liberty of action of any member of a civilized community against his will is self protection and the prevention of harm to others.<sup>2</sup> Mill conceives the "appropriate region of liberty" to be a sphere of individual action in which society has no interest, or, if any, only an indirect concern. "It is that portion of the individual's life and conduct which, if it affects others, it does so only with their free, voluntary and undeceived consent and participation."<sup>3</sup> There is a class of actions, Mill maintains, which affect only the doer and another class which affect the community as well. The first class he calls "self regarding" or "self referrent" acts, the second class, "social" acts. For acts of the former class the individual is unaccountable to society and he should suffer no punishment for performing them further than such as may result from the disapprobation of public opinion, and the inconveniences strictly inseparable from the unfavorable judgment of his neighbors.<sup>4</sup> The supposed good of the individual, physical or moral, Mill argues, can never constitute a sufficient warrant for the exercise of compulsion or the imposition of restraint by society upon his

<sup>1</sup> This essay, declares John Morley, was little more than an enlargement, though a very important enlargement, of the principles of the still more famous speech for liberty of unlicensed printing with which Milton ennobled English literature two centuries before. *Fortnightly Review*, vol. 20, p. 234.

<sup>2</sup> *Essay on Liberty* (People's Edition), p. 6.

<sup>3</sup> Ibid. p. 7. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society the part which chiefly interests society," p. 44.

<sup>4</sup> Ibid. pp. 46, 55.

conduct. If his acts are hurtful to others or wanting in due consideration for their welfare without going to the length of violating any of their constituted rights, he may be punished by public opinion but not by the state. If he be in the full maturity of his powers, society has no right to say that he shall not do with his life what he chooses to do.<sup>1</sup> Any other view, Mill contends, must ascribe to mankind a vested interest in each other's moral, intellectual and even physical perfection, the extent of such right to be determined by each claimant according to his own standard.<sup>2</sup>

The first criticism to be made of Mill's doctrine of liberty is the indefiniteness and vagueness of his language. His admission that "self protection" and "prevention of harm to others" are legitimate warrants for the exercise of state compulsion is a virtual begging of the question, and tends to destroy the force of his theory. It does not appear from his definition to whom "self protection" refers nor against what it is to be directed. If the "self protection" to which he alludes has reference to the protection of society against the individual, then the power of society over the individual is limited only by its own judgment of its interests as opposed to those of its component members, which is no more than the socialist would claim. A brief for state ownership, or even an argument in favor of Prudhon's dictum that private property is robbery, might easily be founded on this doctrine. Moreover, Mill recognizes exceptions and qualifications to his theory which are really inconsistent with it and which tend to reduce his doctrine to a commonplace not worth disputing.<sup>3</sup> Thus he admits that a public officer or a private citizen who should see a person attempting to cross a dangerous bridge would have the right to interfere and restrain such a person without committing any real infringement upon his liberty, for liberty consists in doing what one desires and no one can desire to suffer pain.<sup>4</sup> But it may be doubted whether upon this interpretation there would be any limit to the right of interference since it might easily be construed to justify inter-

<sup>1</sup> *Liberty*, p. 45.

<sup>2</sup> *Ibid.* p. 53.

<sup>3</sup> Compare Stephen, *Liberty, Equality and Fraternity*, p. 23.

<sup>4</sup> *Liberty*, p. 57.

vention in the interest of a man's business, social, or political success. Furthermore, Mill expressly limits the application of his principle to "human beings in the maturity of their faculties" and adds that we may "leave out of account those backward states of society in which the race may be considered in its non-age."<sup>1</sup> He frankly admits that despotism is a "legitimate mode of government for dealing with barbarians provided the end be their improvement and the means justified by actually effecting that end." He admits that liberty as a principle has no application to any state of things anterior to the time when mankind have become "capable of being improved by free and equal discussion." These qualifications in effect weaken his theory, for after all, maturity of judgment and civilization are conditions of degree and the lines of separation which distinguish them from their opposites are largely arbitrary. It is doubtful if there are more than a few persons who possess that maturity of judgment which makes them better judges than society of their own welfare. Mill himself admits that "on any matter not self evident there are ninety-nine persons totally incapable of judging of it for one who is capable."<sup>2</sup> Clearly, then, the state is justified in protecting such persons, contrary to their own immature judgment, against disease and danger, compelling them to be educated, to educate their children, and to live outward lives of decency.<sup>3</sup> Mill's doctrine that the capacity of man for improvement by free and equal discussion should be considered a test of his immunity from state compulsion, is arbitrary and wholly impracticable. Finally, his doctrine of self regarding or self referrent acts in the form in which he states it, will not bear investigation. His theory that there is a class of actions which concern only those who perform them and, consequently, that there is a sphere of individual life in which society can have no interest, rests on the erroneous assumption that society is a mere aggregate of physical beings each living in isolation from the rest and without any sense of mutual obligation or interdependence. Such a view represents an effort to treat the individual as if he were not a part of society but rather

<sup>1</sup> *Liberty*, p. 6.

<sup>2</sup> *Ibid.* p. 30.

<sup>3</sup> Cf. Ritchie, *Principles of State Interference*, p. 118.



a sovereign being. But according to all accepted theories of social organization, society is something more than such an association. Apart from his surroundings and relationships, completely emancipated from all social influences the individual is a mere abstraction, a negation.<sup>1</sup> The modern individual is not a creature of *status* but of *contract*. He has been aptly defined as a "bundle of relations," an epitome of society rather than a mere fraction of it.<sup>2</sup> He cannot be conceived of as being uninfluenced by and exerting no influence upon those by whom he is surrounded. The higher the state of society, as Prof. Huxley observes, the more completely do the actions of one member of the social body influence all the rest and the less possible is it for any one man to do a wrong thing without interfering more or less with the freedom of his fellow citizens.<sup>3</sup>

We may therefore accept the judgments of Lord Pembroke that there are hardly any actions which are purely self regarding,<sup>4</sup> and of Prof. Ritchie that it is doubtful whether even any thoughts of the individual can, in the strictest sense, be self regarding and so a matter of indifference to other individuals.<sup>5</sup> Granting *arguendo* Mill's contention, however, as to the possibility of a class of actions which affect only the doer of them, we can find no practicable test by which they may be separated from those which affect others. Mill frankly admits that the mischief an individual does to himself may "seriously affect" society at large, as where he is guilty of intemperance, nonpayment of his debts, extravagance, neglect of his family, etc., in

<sup>1</sup> Compare on this point Leroy-Beaulieu, *L'État Moderne et ses fonctions*, p. 32.

<sup>2</sup> Montague, *Limits of Individual Liberty*, pp. 57, 101. See also Ritchie, *Principles of State Interference*, p. 11. "Freedom as the complete emancipation of the individual from all social influences, is an utter impossibility." Simcox, *Natural Law*, p. 14.

<sup>3</sup> *Essays*, vol. i, p. 261.

<sup>4</sup> *Liberty and Socialism*, p. 82. See also Montague in Mackay's *Plea for Liberty*, p. 61.

<sup>5</sup> *Principles of State Interference*, p. 97. Men are so closely connected together, says Sir FitzJames Stephen (*Liberty, Fraternity and Equality*, p. 138), that it is quite impossible to say how far the influence of acts of apparently the most trivial character may extend. "The sentiments of the founder of a great religion, the reflections of a great philosopher, the calculations of a great general may affect the form of the mould in which the lines, thoughts, and feelings of hundreds of millions of men may be cast."



which case he may be justly punished. But the punishment can only be inflicted for breaches of obligation resulting from the acts mentioned, not for the acts themselves. Thus, no one should be punished for drunkenness, although a soldier or a policeman should be punished for neglect of duty resulting from drunkenness. If, continues Mill, the act violates no specific duty to the public nor occasions any perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear for the sake of the greater good of human freedom.<sup>1</sup> It is only where there is a definite damage either to an individual or to the public that the case is taken out of the province of liberty and placed in that of law. But clearly there is no principle upon which such a distinction can be founded. Few will deny that drunkenness, licentiousness, and debauchery are vices which tend to undermine society, yet the resulting injuries are not always specific and assignable to particular individuals. No such test of the right or wrong of state compulsion is sound in principle or possible in practice.

Mill admits that society has the right to punish such vices by public disapprobation or social intolerance although such punishment may be and in some countries is, as he acknowledges, more severe than that prescribed by the state. If, as Lord Pembroke observes, law is nothing but public opinion organized, defined, and equipped with force, i. e., regulated public opinion,<sup>2</sup> what can be the objection to the substitution of state punishment in the place of that inflicted by public opinion, especially when the latter is often visited upon the offender without regularity, without a hearing, without proof and sometimes with unrelenting severity. Viewed from a standpoint of individual liberty, so widely marked a distinction between legal and social penalties, between restraint imposed by the state and that imposed by the multitude, seems indefensible. His argument against state inter-

<sup>1</sup>*Liberty*, p. 48.

<sup>2</sup>*Liberty and Socialism*, p. 40.

Mill declares that all restraint *qua* restraint is evil. *Liberty*, p. 56. This is substantially the Benthamite doctrine that every law is an evil since law implies an abridgment of liberty, and every infraction of liberty is followed by a sentiment of pain. *Principles of Morals and Legislation*, p. 94.

vention rests on the assumption that government and liberty represent opposite poles of society, that they are pitted against each other as hostile forces, that a maximum of the one means a minimum of the other, i. e., that the amount of liberty varies inversely in proportion to the amount of government. It is, says Ritchie, like treating the two as if they formed the debit and credit sides of an account book.<sup>1</sup> That is a very narrow view indeed which sees, in a factory act, a pure food law, or a vagrant act, only an abridgment of individual liberty rather than an enlargement of the security of society. Had Mill stated that all arbitrary, unnecessary, and unreasonable restraint—all “over government” as Prof. Seeley would say—were an evil, no fault could be found with his conclusions, but to characterize all restraint as an evil is to ignore the fundamental distinction between that which is good and useful and that which is bad. Restraint is the law of life without which the realization of the ends of life would be impossible.<sup>2</sup> To define liberty, as Mill does, merely as the absence of restraint, the being left alone by the state, is to ignore that larger liberty without which the end of life cannot be fully realized. There must not only be immunity from restraints imposed by the state or by individuals and associations of individuals of whatever character, industrial, commercial, social, professional, political, or ecclesiastical, but the individual must be placed in a condition in which he is capable of developing harmoniously all the faculties with which he is endowed by nature. Wisely directed, state action to a large degree not only creates but enlarges the moral, physical, and intellectual capacities of the individual for activity and enjoyment by

<sup>1</sup> *Principles of State Interference*, p. 12. Compare on this point Leroy-Beaulieu, *L'État Moderne et ses Limites*, p. 30. The proper view to take of the relation, says Laboulaye, is not to regard authority and liberty as two hostile powers but as two distinct elements which go to make up parts of one and the same organism. Liberty represents individual life; the state, the common interests of society. They constitute two circles of action which have neither the same center nor the same circumference. They touch at more than one point but they ought never to be confused. *L'État et ses Limites*, p. vi.

<sup>2</sup> “It may fairly be doubted, says Donisthorpe, whether there has ever been a restraint put upon individuals by even the most despotic of governments which may not at one time or another have been a necessary and beneficent concomitant of social evolution.” *Individualism*, p. 298.

freeing him from the necessity of a perpetual struggle with those who would oppress him and by liberating his latent abilities.<sup>1</sup>

Mill and his followers lay too much emphasis on the value of individuality. He asserts that it is good that there should be "different experiments in living" and that "free scope should be given to varieties of character if there is no injury to others." Variety of conditions, he argues, develops the faculties of perception, judgment, discrimination, mental activity, and even moral preference, while, on the contrary, there is no excellence in conduct which is simply imitative.<sup>2</sup> If Mill meant by individuality, strength of character, the power of initiative and originality, little objection could be taken to his proposition, but his language shows that he confuses these virtues with mere diversity, eccentricity and variety of human living, qualities which in themselves have no moral or intellectual value. There is no evidence that the discipline of government tends to reduce mankind to a state of uniformity and thereby retard the development of a wholesome individuality. On the contrary, no genuine individuality could exist under such a régime of liberty as that which Mill advocates.<sup>3</sup> It is true, as Burgess has pointed out, that the individual, both for his highest development and the highest welfare of society, should be allowed to act freely within a certain sphere and that the impulse to such action is a universal quality of human nature.<sup>4</sup> But the state rather than the

<sup>1</sup> Cf. Ritchie, *State Interference*, p. 50; Funk-Brentano, *La Politique*, p. 34; Locke, *Civil Government*, p. 297.

<sup>2</sup> *Liberty*, pp. 33, 34. For a similar line of argument see Humboldt, "*Ideen zu einen Versuch, die Gränzen der Wirksamkeit des Staats zu bestimmen*," ch. ii. "The true end of man, says Humboldt, prescribed by the eternal and immutable dictates of reason, is the highest and most harmonious development of his powers to a complete and consistent whole. Freedom is the grand and indispensable condition which the possibility of such a development presupposes; but there is, besides, another essential—a variety of situations. Even the most free and self reliant of men is thwarted and hindered in his development by uniformity of opposition."

<sup>3</sup> Cf. Montague, *Limits of Individual Liberty*, p. 131. "Mankind," says Burgess "does not begin with liberty." Mankind "acquires liberty through civilization," op. cit., vol. i, p. 88.

<sup>4</sup> Op. cit. vol. i, p. 176. Compare the following from Funk-Brentano (*La Politique*, p. 28): "La liberté ainsi que la force, est une faculté inherente a la nature de l'homme, une nécessité de ses constitution intellectuelle et morale. Dire que l'homme possède le droit de la liberté est comme si l'on disait qu'il a le droit d'être os et muscles, ou que le triangle a le droit d'avoir trois côtes."

individual must be the judge of the limits of this sphere and the overwhelming experience of the past teaches that these limits cannot be drawn in accordance with the theories of Humboldt, Mill, Spencer, and the other individualists.

When we come to lay down a definite and positive rule or test according to which the proper boundaries between the spheres of government and liberty should be drawn, we are confronted with one of the most difficult of all the problems of political science. We are safe in saying that the question cannot be settled upon any single *a priori* principle applicable to all cases alike. No limits can, says Huxley, be theoretically set to state interference. Dogmatists have frequently undertaken on the basis of theoretical discussions of the nature of liberty to lay down what things the state has a right to do and what it has not—that is, how wide should be the province of government and how wide that of liberty—but all such attempts to solve the problem are as futile as the effort to discover the nature of light by discussions concerning the nature of darkness. If any general rule may be formulated, it must be deduced from a consideration of the question whether the purpose of state intervention in a given case is for the common good, whether the proposed action is likely to be effective, and, if so, whether it can be brought about without doing more harm than good.<sup>1</sup> If a proposed act of intervention fulfills these conditions no valid objection can be raised to it, because it violates some abstract principle of individual liberty or some doctrine of natural rights.<sup>2</sup> But this test is insufficient because of the lack of a consensus concerning what constitutes the common good. To say that the common good or the general welfare should be the test of the right of the state to interfere with individual conduct is like telling one who asks for moral guidance to keep to the path of duty without telling him what his duty is. The amount of government necessary in a given case is such as is required to overcome the dangers within and without to which society is exposed and for protection against which the state has been

<sup>1</sup> Cf. Stephen, *Liberty, Fraternity and Equality*, p. 137.

<sup>2</sup> Cf. Ritchie, *Studies in Political and Social Ethics*, p. 63; also Amos, *Science of Law*, p. 90, and Locke's *Civil Government* (Morley), p. 258.

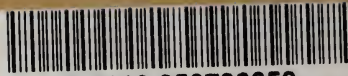


formed. "If then," says Prof. Seeley, "you ask how much government we ought to have, the only answer I can give will be, you ought not only to have but you invariably will have as much as is necessary for this purpose."<sup>1</sup> In other words, it will vary directly in proportion to the number of causes calling for common action. A state which from its geographical situation is free from the danger of outside pressure may safely allow a relatively large degree of liberty to its subjects. On the other hand, one which is constantly exposed to foreign invasion and which therefore is under the necessity of exalting the military at the expense of the civil power in order to insure the national existence, cannot safely allow so wide a degree of freedom. And the same may be said of a state peopled by a race who have for centuries been strangers to liberty and who therefore have not yet learned the lessons of its limitations or of the dangers of its excesses and to whom the gift would be as fire in the hands of an infant. Thus the capacity of particular races for the full enjoyment of liberty is as variable a quantity as the degree of their education, their instinct for self government, their respect for authority, their habits of thought. It is extremely doubtful if the same amount of liberty could safely be allowed the Slavic and probably the Celtic races as is enjoyed by the Teutonic nations today.<sup>2</sup> Since the middle of the nineteenth century there has been a remarkable tendency among the states of the civilized world to push the lines of government farther into the field which the individual under former conditions would have a right to claim as belonging to liberty. But present conditions are so unlike any that have existed in the

<sup>1</sup> *Introduction to Political Science*, p. 129. It was one of Montesquieu's maxims that liberty flourishes most in small states. In large states, he argued, the necessity of holding together widely separated regions and of reconciling conflicting interests due to geographical isolation required strong government and a corresponding abridgment of freedom. But many instances could be given to show the fallacy of this proposition. Equally fallacious is his theory that cold climates are favorable to liberty and warm ones to servitude and that democracy is better adapted to barren soils than is monarchy. *Esprit des lois*, bks. 17 and 18. For a criticism of Montesquieu's theories of the effect of geographical influences on liberty, see Laveleye, *op. cit.* chs. x, xi, xii.

<sup>2</sup> For the influence of race traits on liberty see Laveleye, *Le Gouvernement dans la Democratie*, p. xiii.





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past as to render impossible the recognition of any such claim. It should be observed, however, that the so-called state interference of the present century differs from that of preceding centuries in being legislative rather than administrative in its nature. As Professor Seeley observes, the nineteenth century state may well be called the "legislative state."<sup>1</sup> During the last century the province of executive government to which we still retain our traditional hostility has been greatly narrowed. But the revised statutes of every modern state, already abnormally large, continue to grow in bulk with each passing year. Whether life under a future edition will, as Herbert Spencer maintains, be a burden and the status of the individual that of a slave, is a question which need not worry us. No one will deny the truth of Jevons's statement that notwithstanding the multiplicity of statutes under which the modern individual must live, he is an infinitely freer and nobler creature than the wildest savage who knows no restraints but those of nature, yet who is always under the physical despotism of want.<sup>2</sup> Liberty, like everything else, is good or bad according to the use which is made of it. It has, as an acute writer observes, been too often played with by poets and misunderstood by statesmen, worshipped as a "splendid robed goddess" and treated as the only and all sufficing end of the state. To some it has been a priceless boon, to others a curse. But on the whole it may be doubted whether mankind has suffered more in the past from an excess of government than from an excess of liberty. Liberty is not, as Benjamin Constant maintained, the end of all human associations,<sup>3</sup> but is merely a means for the realization of the fullness of individual life. It is, therefore, beneficial only in so far as it helps man to attain that other freedom which is an end in itself, the end of all social organization.<sup>4</sup>

<sup>1</sup> *Introduction to Political Science*, p. 146.

<sup>2</sup> *The State in Relation to Labor*, p. 14.

<sup>3</sup> *Principes de Politique*, p. 145. (Ed. 1861.)

<sup>4</sup> Montague, *Limits of Individual Liberty*, p. 182.

JAMES W. GARNER.

University of Illinois.